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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re HECTOR C. et al., Persons Coming  
Under the Juvenile Court Law.

B150135  
(Los Angeles County  
Super. Ct. No. CK33981)

DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES, LOS ANGELES  
COUNTY,

Plaintiff and Respondent,

v.

MARIA C.,

Objector and Appellant.

APPEAL from the orders of the Superior Court of Los Angeles County. Donna Groman, Juvenile Court Referee. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Objector and Appellant.

Lloyd W. Pellman, County Counsel, and Gary P. Gross, Deputy County Counsel, for Plaintiff and Respondent.

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Maria C., the mother of minors Hector C., Jose C., Maria Elena C., and Graciela C., appeals the denial of her petition filed pursuant to Welfare and Institutions Code<sup>1</sup> section 388 and the subsequent order terminating her parental rights pursuant to section 366.26. Because we find there was no abuse of discretion in denying the section 388 petition and that substantial evidence supports the termination of parental rights, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

The family of Maria C. first came to the attention of the Department of Children and Family Services (DCFS) on May 27, 1998, in response to an anonymous allegation of physical abuse. Maria's four children, Hector (age 8), Jose (age 7), Maria (age 3) and Graciela (age 1) were found in a filthy house. There were trash and smelly, dirty clothes everywhere. There was no edible food, but rotting food was found in the living room and in the refrigerator and kitchen. There was filthy, soiled bedding on broken mattresses on the floor. Hector had some injuries to an eye, which he explained as having resulted from running into a door. Jose had scratches on his leg and back, which he explained as injuries from playing baseball with his brother.

The children explained that there were roaches and rats in the house because they left food around the house. Mother denied any problem with such vermin. The children were detained in emergency shelter care.

Maria and Graciela are the children of Arturo, who lived with Maria and the children. Jose was the son of Arturo's brother Ruben, who lived in Mexico. Hector was the son of Mario A., who was never located during these proceedings. Arturo had worked at a chemical company for 10 years. Maria got a fourth grade education in Mexico and came to the United States in 1978. She left two children in Mexico to be raised by her mother. She sent those children money, working in sewing factories,

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

restaurants and bars. She had not worked in eight years. The boys reported that she took them along when she collected cans to sell.

*The Plea and Disposition.*

On June 25, 1998, Maria and Arturo admitted the allegations of an amended petition that they inappropriately disciplined the three older children, that the minors' home was so dirty that it endangered the children, and that they were unable to adequately supervise or protect the minors or provide them with adequate food, clothing, shelter or medical treatment.

The children were ordered suitably placed in foster care. Maria and Arturo were ordered to complete an extensive program of parent education and individual family counseling. Monitored visits were ordered at least two times per week, with DCFS authorized to liberalize visitation, and to bring to the court's attention when the parents were ready for a 60-day home visit.

The children underwent psychological and physical evaluations within the first few months of their detention. There was no indication that any of the children had any health problems. Hector was of average intelligence but was reported to have difficulties in school and had been suspended due to behavior problems. He was aggressive. He was defensive and protective of his mother and denied physical abuse. He explained that he behaved badly so his mother had to hit him. He was angry at Jose for having told the doctor that their mother hit the children which resulted in their removal from home.

Jose was also of average intelligence, abilities and performance. He was a restless and anxious child, destructive to household furniture and easily distracted. He was a behavior problem to the foster parent. He admitted that his mother hit him hard, but he was anxious to be reunited with her.

Maria was generally in good health, but was found to be in need of significant dental repair. She was below average in intelligence and suspected of being developmentally delayed. She was delayed verbally, with enunciation and stuttering problems. She had not been enrolled in preschool and easily got into fights with other children. She was self-centered, stubborn, unwilling to share, and needed attention.

The baby, Graciela, was healthy but significantly delayed in both motor and language development. It was clear that she needed more stimulation than she had been getting.

*The First Six-Month Review.*

In December 1998, the court conducted the first six-month review. DCFS reported that Maria and Arturo had completed parent education classes on September 28, 1998, having attended weekly for 10 weeks. Their instructor reported that both showed a good level of awareness regarding their parenting roles. Maria reported that she learned of the importance of patience with children and the need to enforce rules by appropriate punishment when rules are broken. She admitted letting the children get away with a lot and not knowing how to enforce rules. Both Maria and Arturo were on the waiting list for individual counseling. Parents visited regularly though there were some difficulties reported by the foster parent that the parents were not clear about when they would visit and were sometimes hours late. It was also reported that the parents did not set clear limits for the children or control them during the visits. Two unannounced visits to the family home found it to be in unsanitary condition, with piles of clothing on the floor and beds, food on the kitchen floor and empty beer cans everywhere. Arturo admitted drinking three cans of beer every evening after work.

The foster parent complained that Arturo smelled like beer during some visits. The social worker informed the parents they must clean the house and that Arturo could not visit if he was under the influence.

The children were adjusting well in foster care though the three older children all continued to express their desire to go home.

The case was continued for six months under the same terms and conditions, which included individual therapy. Arturo was ordered to undergo random alcohol testing and attend Alcoholics Anonymous twice weekly, and the court ordered no visitation if anyone was under the influence.

### *The 12-Month Review.*

Not much had changed for this family by June 1999 when the 12-month review was conducted. Parents still had not attended individual counseling, though the social worker reported providing parents with referrals and bus passes. Mother stated she could not attend because she could not afford to pay for the therapy. Father did attend alcohol counseling.

The social worker reported that she had initiated adoption assessment for the minors who by then had been moved to another foster home. The children had been removed from the earlier placement due to inappropriate discipline by the foster mother and the fact that her live-in boyfriend had a criminal record.

The recommendation of the department was for termination of family reunification services. The matter was set for contest in August 1999. When the matter was called for contested hearing, counsel for both parents submitted on the recommendation, and the court ordered unification services terminated.

### *The 18-Month Review.*

The matter was next on calendar in December 1999, 18 months after the original detention, for a report in accordance with section 366.26. The department reported that while the permanent plan continued to be adoption, no adoptive home had been located for the children. The foster parent was willing to be a guardian but not interested in adoption.

During the six-month period between June 1999, when the recommendation to terminate reunification services was made, and December, the parents continued to be involved in therapy and counseling, though their attendance and compliance was irregular. The parents continued to have monitored visits with the children, two or three times per month, but they occasionally failed to show up at scheduled times, disappointing Hector and Jose.

### *The 24-Month Review.*

At a hearing in June 2000, 24 months after their initial detention, the department reported that the parents visited consistently every week, but that there was no reaction

on the part of the children when the parents left. The court suggested that counsel for the mother and children consider filing a section 388 petition, and asked the department to consider longer visits for the children in a place other than McDonald's, which was the setting for most of the visits. Both Hector and Jose continued to express their desire to go home.

The social worker extended the parents visits to three hours every week at a local park, but parents left between one-half to one hour early each time. In addition, the social worker had set up a schedule for telephone calls, but parents had taken advantage of only two of six possible call times.

#### *The 30-Month Review.*

It was not until the matter was before the court on December 7, 2000 that mother's attorney actually filed a section 388 petition requesting the children be placed at home with her. The petition was summarily denied because the court found it to be inadequate. Counsel indicated that the petition would be supplemented. The department reported that 13 visits had taken place at a park, and then at the foster home until the foster parent declined to act as the monitor. The parents' visits were consistent, but the social worker reported that there was not much interaction between parent and child. Mother usually brought food and the children ate, the children then played but mother was not involved. She did not ask them questions about their lives, or school, and generally left it up to the children to interact with her.

It was reported that Arturo continued with drug testing and had eight negative tests and one positive for cocaine. He had missed four tests.

The significant development that was reported was that a prospective adoptive family had been identified. The prospective adoptive parents had been married since 1993, and the wife had two adult children from a previous marriage, ages 28 and 21. They were interested in adopting all four children.

On January 26, 2001, the children were placed with the adoptive family. They indicated at that time that they were willing for the children to maintain contact with their biological parents even after adoption finalized. The March 2000 report to the court indicated that the parents continued to visit regularly and that the parents told the

children they would be home by the next court date. The therapist reported that Jose and Hector were getting confused from their parents' unrealistic expectations of reunification. It was reported that mother told them, "I do not want you to visit with these people or else I will stop fighting for you in court." In spite of the confusion, the children were adjusting very well to their adoptive home. They quickly became very attached to their adoptive parents. The matter was set for a termination hearing in April, then continued for a contested hearing in May.

*The termination hearing and filing of a section 388 petition.*

On May 8, 2001, the matter was on calendar for consideration of termination of parental rights. On the date of the hearing, mother's attorney filed a section 388 petition which the court heard in conjunction with the termination proceedings. The social worker testified that mother had completed all counseling that had been ordered by the court, but there was very little interaction between the parents and the children. Mother was generally inattentive during visits. The parents did little to control the children during the visits. They usually just sat there during the visits. They never brought books or toys to the visits, although they did bring food. They never asked the children about their health, or about school. Sometimes the girls would bring their artwork to show to mother, but she never went to the table to see what they were doing. Instead, she sat on a couch and waited for them to come to her. The minors' therapist was concerned that the children were acting like "surrogate parents." The social worker testified that mother did little to control or discipline the children during visits. She testified that the children would continue to be in danger because Arturo continued to have a drug problem. Even if Arturo were no longer in the home, the worker believed that the children would be at risk because she never observed mother to exert any control over the children.

Mother testified that she spent time talking with the children during visits about school, friends, homework and their behavior. She testified that her home was currently clean and that if the court ordered, Arturo would move out of the house and she would make sure that he stayed away. Arturo testified that he would move out of the house if required to do so to permit the children to return.

The section 388 petition was denied finding that there had not been a significant change of circumstance and that it was not in the minors' best interest to remove them from the adoptive home and return them to mother. The court stated that "[i]t appears to be a very stable, loving home, which can provide for all the children's needs. Whereas it is highly questionable whether the mother can ever provide a safe and appropriate home for the children."

As for the section 366.26 hearing, the court found by clear and convincing evidence that the children were likely to be adopted. The court found that mother did not sustain her burden of establishing an exception to termination as set forth in section 366.26, subdivision (c)(1)(A). The court stated that although mother "had consistent, regular visitation . . . , the relationship between the mother and the children was not of such a magnitude that would create the situation where termination of parental rights would be detrimental to the children." The court ordered parental rights terminated.

### CONTENTIONS ON APPEAL

Appellant contends (1) the court abused its discretion in denying the section 388 petition, and (2) the court erred in concluding she had not established an exception to termination of parental rights based on her substantial bond and relationship with the children.

#### *1. The court did not abuse its discretion in denying the section 388 petition.*

Section 388 provides that a person having an interest in a child who is a dependent of the juvenile court "may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for [an order] to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held . . . ."



In reviewing an order denying a section 388 petition, we will reverse only if it is established that the juvenile court abused its discretion. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) ““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

The record here discloses that after almost 36 months of court supervision and placement of her children in foster care, and more than 20 months after family reunification services had been terminated and adoption identified as the possible permanent plan for her children, mother filed a petition under section 388 seeking the return of the children to her.

This is a sad situation. What began as a “dirty home” and inappropriate discipline case dragged on month after month, then year after year, revealing drug and alcohol problems on the part of mother’s spouse and inability on the part of mother to maintain a house clean enough to provide a safe environment for the children. Although mother completed all ordered counseling and father participated in drug and alcohol programs and testing, it never became clear that the parents were ready to have the children returned to them.

The court sought to address this by suggesting a 60-day visit, or visits in a park, and scheduled opportunities for telephone contact, but it was never clear that the parents were putting forth their best effort to do what was necessary to prepare themselves for the children to return. This presented a great disappointment to the children, especially Hector, who was almost 10 when the dependency proceedings began, and Jose, who was seven. They blamed themselves and each for not cleaning up and for causing their parents to inappropriately discipline them. They longed to return home.

Though there was no evidence of any physical deprivation, psychological evaluations of the children revealed that the children suffered from lack of attention and discipline. They had difficulty getting along with other children; they did poorly in school. It was clear that three-year-old Maria Elena was a needy child, craving attention, and that 13-month-old Graciela had little stimulation.

The children were moved from placement to placement, and over the period of 36 months certainly appear to have improved and benefited from the stability of a clean and constant environment. The older children's behavior problems subsided, their school work improved, and they appeared to thrive from the attention they received from their foster parents, and ultimately from the adoptive parents.

While the parents visited with the children on a relatively consistent basis, observations of their contact were disappointing. There was little real involvement on the part of the parents in the day-to-day life of the children, exchanging information about school or friends, or keeping in touch other than during the visits. Mother never brought books or games or toys, although she always brought food. She made unrealistic promises to the children about their imminent return and interfered with their relationship with the prospective adoptive parents by threatening the children that she would not continue to try to get them back if they became attached to the adoptive parents.

The court was particularly disturbed by the failure on the part of both parents to take the father's substance abuse problem seriously. The only "change of circumstance" that can be gleaned from this record is that mother expressed a willingness to have Arturo move out of the house if that would enable the children to be returned to her. Arturo also agreed to such a move. But there was no indication that the parents had made any realistic preparation for such a move, which no doubt would be costly to the family and difficult for the couple to undertake and maintain. Each day, week, month and year of a young child's life is critically important in the child's development, physically, mentally and emotionally. This is clearly a situation where the parents did too little, too late.

In light of the foregoing, we cannot conclude that the juvenile court exceeded the bounds of reason in concluding that the facts simply did not support a change of the permanent plan to return the children to appellant. The court did not abuse its discretion in denying Maria's section 388 petition.

2. *The court did not abuse its discretion in terminating parental rights and finding the statutory exception inapplicable.*

The court properly declined to apply the “benefit exception” set forth in section 366.26, subdivision (c)(1)(A). After a determination has been made to terminate family reunification services, the juvenile court must then determine whether adoption, guardianship, or long term foster care is the appropriate plan for a child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) Although adoption requires termination of the natural parents’ parental rights (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420), in selecting a permanent plan for a minor, the legislative preference is for adoption over guardianship or long-term foster care, which are not permanent placements. (*In re Teneka W.*, *supra*, 37 Cal.App.4th at p. 728; see also *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Of foremost importance in the procedure for selection and implementation of a permanent plan is consideration of the best interests of the child. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 426-427.) If a child is likely to be adopted, parental rights must be terminated unless one of four enumerated exceptions applies. (§ 366.26, subd. (c)(1).)

“[W]hen the court has not returned an adoptable child to the parent’s custody, and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing. The parent has the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A). ([*In re*] Derek W. [(1999)] 73 Cal.App.4th [823,] 826-827; [*In re*] Lorenzo C. [(1997)] 54 Cal.App.4th [1330,] 1343-1345.) The juvenile court may reject the parent’s claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. The court must make a more substantial and affirmative finding if it decides to apply the exception and preserve parental rights. It must ‘state its reasons in writing or on the record,’ and those reasons must be ‘compelling.’ (§ 366.26, subd. (c)(1).) Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will

prevail over the Legislature's preference for adoptive placement.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Appellant sought to establish the exception under section 366.26, subdivision (c)(1)(A), which provides that the court may not terminate parental rights if termination would be detrimental to the child because “[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The requisite finding of “benefit” in this exception has been interpreted to mean: “[T]he relationship [must be one which] promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strengths and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The burden is on the parent to prove the existence of this exception. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

The nature of this beneficial relationship was discussed in *In re Casey D.*, *supra*, 70 Cal.App.4th at page 51, as one which “characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.”

It is true that appellant had a significant parental bond with the two older children, Jose and Hector, and perhaps with Maria who was three, when they were initially detained. But over the period of three years while the children were out of her custody and in foster care, appellant never went beyond weekly monitored visits with the children. She never sought unmonitored visits, or overnight visits, or extended visits, or the 60-day visit the court suggested DCFS consider.

Appellant never got involved in any educational issues on behalf of her children. There was evidence that both boys had significant behavior problems in school and some need for independent programming to address their needs. There was no evidence that appellant ever attended any school assessment meetings or participated

in any of her children's school programs. While it is true that she was working and busy, the evidence leads one to conclude that appellant simply left the day to day care of her children in the hands of DCFS and the foster parents and was satisfied visiting them for a few hours on the weekend with no other responsibilities for their care. Although she insisted she wanted her children back with her and seemed to have convinced her children of that sentiment, her actions belie her words.

There was no evidence that she took special clothes to Maria, who grew from age three to age six during this time. There was no evidence that she fixed her hair, or played games with her, or read books to her, or did any of the things that a parent does for a child on a day-to-day basis. All of the real parenting came from the foster parents.

There was very little parent-child relationship between appellant and Graciela, who was only one when originally detained. As she grew up, there was little interaction between the two, and evidence that Graciela would hide behind the foster parent during visits.

The most significant transformation on the part of the children during the three years of foster care was the behavior and academic improvement they experienced as their lives stabilized and as they had an opportunity to grow and be cared for in a clean, safe environment. They easily bonded with their caretakers in each foster placement in which they lived. Clearly, in spite of their behavior problems, they were children who were lovable and in need of love. The difficulty in finding an adoptive home was the fact that there were four siblings and the importance of keeping all four children together. They were fortunate to have found an adoptive home in which they were comfortable, safe, and thriving. Appellant's evidence was simply insufficient to outweigh the evidence of benefit the children were experiencing.

In light of the foregoing, we find substantial evidence (see *In re Clifton B.*, *supra*, 81 Cal.App.4th at p. 425) supports the conclusion that appellant failed to satisfy her burden of establishing the statutory exception to the termination of parental rights.

DISPOSITION

The orders under review are affirmed.

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\_\_\_\_\_, J.  
DOI TODD

We concur:

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BOREN

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